EXHIBIT 8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SECURITIES INVESTOR PROTECTION CORPORATION, IRVING H. PICARD,

Plaintiffs,

v.

BERNARD L. MADOFF INVESTMENT SECURITIES, LLC,

Defendant.

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New York, N.Y.

12 Misc. 115 (JSR)

September 21, 2012
4:36 p.m.

Before:

HON. JED S. RAKOFF,

District Judge

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THE CLERK: This is September 21, 2012. This is SIPC, Irving Picard v. Bernard L. Madoff Investment Securities, Docket Number 12 Miscellaneous 115.

Will everyone please be seated, and will the parties please identify themselves for the record.

MS. GRIFFIN: Good afternoon, your Honor. Regina Griffin, Baker Hostetler, counsel for the SIPC Trustee, Irving Picard.

THE COURT: Good afternoon.

MR. LaROSA: Chris LaRosa from SIPC.

THE COURT: Good afternoon.

MR. LONG: Your Honor, Thomas Long, also on behalf of the Trustee.

THE COURT: Good afternoon.

MR. VELIE: Good afternoon, your Honor. Frank Velie, of Sullivan & Worcester. I represent Bank Austria, and I will be speaking here today on behalf of the extraterritoriality defendants.

THE COURT: Good afternoon.

MR. KORTMANSKY: Good afternoon, your Honor. Jonathan Kortmansky, also from Sullivan & Worcester, also representing Bank Austria. I will be assisting Mr. Velie and Mr. Velie will be speaking.

THE COURT: All right.

MR. LACY: Your Honor, I'm Rob Lacy, from Sullivan &

Cromwell. I represent about six different defendants, and I am here because I may have something to add about the Bankruptcy Code when Mr. Velie gets done.

THE COURT: I'm sorry?

MR. LACY: I may have something to add about the Bankruptcy Code when Mr. Velie is done.

THE COURT: OK.

MR. BERMAN: Jeremy Berman, from Skadden, Arps, Meagher & Flom, on behalf of UniCredit and Pioneer.

THE COURT: Good afternoon.

All right. So let me hear from whoever wants to speak on behalf of moving counsel.

MR. VELIE: May it please the Court? I'm Frank Velie. As I said, I represent Bank Austria and I'm speaking here for numerous extraterritorial defendants.

The motion which is before the Court is to dismiss certain claims brought by the Trustee to recover under Section 550 of the Bankruptcy Code subsequent to transfers. The subsequent transfers issued here, your Honor, are wholly foreign. They are from foreign persons. They are to the defendants, all of whom are foreign persons. They all took place abroad, pursuant to foreign law.

Unless you particularly ask me to, Judge, I am going to try to avoid matters that are laid out in the briefs, as I understand it is your practice to have read them and you don't

want me to repeat.

The remarkable thing about this motion, your Honor, is that the Trustee's claims are absolutely unprecedented. There is no precedent whatever offered by the Trustee or by SIPC where a Court reached out and recovered for a trustee foreign transfers of this type. There are only two instances -- in all the briefing, there are only two cases that deal with a similar issue; that is the Maxwell case and the Midland Euro case. The Maxwell, as I'm sure the Court is aware, three courts here -- the Bankruptcy Court, the United States District Court for the Southern District and the United States Court of Appeals for the Second Circuit -- all held that a person in the shoes of a trustee, and there he was an examiner, was not permitted to extend the recovery or, actually, the avoidance of the section in that case to extraterritorial transfer. And in the Midland Euro case -- that's the Bankruptcy Court for the Central District of California -- the same result.

What's remarkable about those two cases is in both cases the transferor was the debtor. It was a foreign debtor, and in both cases the transferee was an initial transferee. This is a distinction from our case, but an important one which cuts in our favor. Because, as I'm sure the Court will recognize, an initial transferee takes something out of the pocket of the estate that harms the estate, whereas it's no skin off the nose of the trustee if the initial transferee

gives something to somebody else. That does not take anything out of the pocket of the debtor. In any event, there is no precedent and so this Court is being invited to do what I would claim is a very radical thing, which is to undo these wholly foreign transfers.

Not only is the case unprecedented but it appears to fly -- the claims are unprecedented, but they appear to fly directly into the Morrison decision of the Supreme Court. I don't have to rehearse that here, but the obvious thing about Morrison is it is a bright-line test. If the statute doesn't say it has extraterritorial reach, it has none.

Here, as we showed in the briefs, and I will not go into this in detail, neither of the statutes at issue here -- neither Section 550 of the Code nor 78fff-2(c)(3) of SIPA -- say that they have extraterritorial reach, and that should be the ball game.

Surprisingly, the Trustee and SIPC argue: No problem. We're not in the way of Morrison. This is a domestic application here. We are not reaching out extraterritorially.

I actually find that very surprising because, as I started out by saying, these are claims to recover subsequent transfers made by foreign persons to the foreign defendants overseas under foreign law. I would think that their argument falls of its own weight, and I am going to give it little bit of a shove.

ARGUMENT

Without authority, what we are offered is a syllogism, and the syllogism goes like this. It has three premises.

Number one: The Code and SIPC have only one focus.

The second premise: That focus is to replenish the estate of domestic debtors.

And number three: What we have here is a domestic debtor. It made a transfer. Therefore, we can go all over the world and recover anything that was transferred initially by the debtor.

That's the syllogism.

Number one. Morrison does not suggest or hold that a doorstopper, like the Code, or even a relatively narrowly-focused statute like SIPA would have only one focus. In fact, in Morrison, the focus was on 10b. And there was a contrary, a contrasting focus on Sections 30a and 30b, which are extraterritorial. The Court naturally finding that since Congress knows how to write extraterritoriality into a statute when it wants to, it didn't put it in 10b and it did put it in 30a and 30b.

Second, as we've laid out in the briefs -- and I will not, unless you ask me to, go into this in any detail -- the proper transfer here under Absolute Activist and in Morrison is obviously the transfers, the transfers at issue. And we point that all out in the brief.

The third point is that the transfers here are not

domestic in any regard; they are wholly foreign. As an example, this is a miniaturized version of the HSBC Complaint in which Bank Austria is sued. Count One talks about preferential transfers (initial transferees), that's against the feeder fund defendants except for Primeo. Count Two is preferential transfers of subsequent transferees. This is what we are focusing on. It is counts such as this in which we are sued and which should be the proper focus of the Court in this matter. So all three of the premises of the syllogism don't hold up under analysis.

But the conclusion doesn't, either. And it certainly doesn't follow and it probably stands the presumption against extraterritoriality on its head to say, well, if we have a domestic debtor and it is domestic focus, we can go all over the globe and undue transfers that have any commercial practice between commercial parties in other countries and take their money away. It's the impact of this which seems to us to be wholly unreasonable.

This Court is being asked -- again, without any precedent -- this Court is being asked, first, to go out and to say in effect to foreign persons forget your law, forget that you may have litigated with a liquidator in the country where you live and you may have even prevailed against that liquidator on certain claims and have gotten to keep the transfer at issue, a broker-dealer in the United States went

bankrupt. And when a broker dealer goes bankrupt, a special statute springs into effect and after-the-fact this special statute under U.S. law -- you would be saying to these foreign persons -- this legal fiction springs into effect after the fact and it gives the trustee a right to claim your money. And we're going to take your money, and we're going to take your money and we're going to give it to that trustee so he can share it out among customers of his bankrupt. And, oh, by the way, you're not customers of his bankrupt so you are not going to get anything.

They're asking you to say, and to be the very first court to have done this, to say to foreign sovereigns, in the person of foreign courts in their court-appointed liquidators, forget your liquidation, forget that you are trying to get assets for the purpose of doing something for the creditors of the feeder funds, these hedge funds in various places where there are liquidations going on in these foreign countries under the supervision of foreign courts, forget all of that. We've got this legal fiction, and we're going to take every penny and we're going to give it to our bankrupt to share among its creditors.

This seems to me a radical intrusion into foreign matters, into matters which are the concern of foreign sovereigns, foreign courts, foreign liquidators, and the like, as well as foreign commercial persons.

ARGUMENT

I am going to leave to your reading of the briefs exegesis of SIPA and the Code, but I think it is plain when you look there you will see that there is no mention of extraterritoriality and, in particular, in SIPA, a mention of a very domestic focus. SIPA Section 78fff-2(c)(3), which is the recovery section, is a very important section which says for purposes of the transfers, for the purpose of such transfer, state law will not apply; state law is superseded. Obviously, the people who wrote that had a domestic concern. They did not say all that they could have: Disregard foreign law, this fiction will spring into effect.

I want to say a quick word about the concept of comity. Here we're talking about legislative or prescriptive comity. This is basically a canon of legislative interpretation. And it says even if the trustee were to have a plausible reading of these statutes which gives it extraterritorial reach, if the impact, as it is here, is to unreasonably interfere with the activities of foreign commercial persons, or the activities of a foreign sovereign, then the court must find some other reading of the statute to avoid that.

Comity, of course, as the Court will recall, was the grounds on which the Second Circuit upheld the decision of the District Court and the Bankruptcy Court in the Maxwell case.

And then a final word.

The Trustee says that the result we argue for is absurd. I was tempted, in preparing this argument, to say, oh, no, their argument is absurd. But that's not the right word for it. It's aggressive. It goes far too far. It is radical is what it is. Their argument is a radical one. This Court is being invited to do something that no other court has done, and it is a radical result.

I also wanted to say, and we did say this in the briefs but I'll finish with this: It is never absurd to read a statute for what it holds and what it does not hold.

Unless you have any questions for me, your Honor --

THE COURT: No. But I do want to hear if there is anything else that any moving counsel wants to say before I hear from responding counsel.

MR. LACY: No, your Honor.

MR. BERMAN: No, your Honor.

THE COURT: OK. Let me hear from Trustee's counsel.

MS. GRIFFIN: Your Honor, would you have any objection to me arguing from here?

THE COURT: No. But just be sure -- a lot of folks are here to hear what you have to say. Some of them are even your friends, so speak loudly enough.

MS. GRIFFIN: Your Honor, I will do my best.

Your Honor, we heard a lot about how there is no precedent. Your Honor, Morrison came down about two years ago,

and I don't think the Trustee disputes that this is the first time that the Court is really being asked to address the issues that were raised about presumption against extraterritoriality that were raised in Morrison with regard to the Bankruptcy Code SIPA. But, your Honor, it's very clear that the defendants' briefs do not engage in any meaningful analysis or focus of the Code or SIPA as Morrison instructs.

And, your Honor, Morrison very clearly directs that you look to the Act as a whole, the Bankruptcy Code or SIPA, you look to the object of solicitude of the statute, you look to what activity Congress is seeking to regulate, and you look to what parties the statute was meant to protect. And, your Honor, it's not about parsing the words of a particular statute; it is looking to what was Congress's -- what was the heart of what Congress was trying to regulate when it enacted the Code? And when the Supreme Court looked in Morrison at 10b, it concluded that essentially Congress' focus was on regulating the transactions -- the purchase-and-sale transactions of securities on a domestic exchange.

And, your Honor, if you apply that analysis here to the Bankruptcy Code and SIPA, you will absolutely see that it is not a syllogism. The heart of what the Bankruptcy Code is seeking to regulate is the liquidation of a debtor. The object of solicitude of the -- but, actually, the purpose of the Bankruptcy Code, it does have more than one purpose. It has

two purposes, one of which is not relevant, which is to provide a debtor a fresh start; but the other is the maximization of the estate's assets for distribution to creditors.

And, your Honor, the avoidance and recovery provisions of the Code effectuate that purpose by essentially righting the wrongs committed by debtors, domestic debtors, who deplete their estate's assets by fraudulently conveying them to other parties. And, your Honor, what parties of the statutes are meant to protect are the defrauded creditors of the debtor here.

And, your Honor, the defense's analysis, if you look in their papers, it is all over the map. As a matter of fact, they don't even address the issue in their moving papers. They talk about -- they seem to suggest that the focus is on the transferees, where they live or where they reside. But, your Honor, it's clear that under the Morrison focus analysis, not the statute's language but the focus analysis, that Congress wasn't focused on the recipients of fraudulent transfers. And if you apply Morrison's analysis here, it's very clear that all the Trustee is doing is using the Bankruptcy Code to remedy the fraudulent conveyances of a domestic debtor here and that using the Morrison analysis, that is nothing more than a domestic application of the avoidance and recovery --

THE COURT: But doesn't that argument cut more strongly in the case of initial transfers, as opposed to

secondary transfers?

MS. GRIFFIN: Well, your Honor, essentially, that's another point we were about to make. The focus of Congress on the avoidance and recovery provisions is not on subsequent transfers. If you very clearly look at 548, it is talking about the avoidance of the debtor's transfers. And counsel is right, we are talking about the initial transfers. And what 550 permits is the recovery of those transfers from any particular recipient.

And so, again, focusing on Congress's focus in enacting those provisions, it's on recovering that property that was fraudulently conveyed by this debtor; it was not on the particular type of transferee. It certainly wasn't on any potential subsequent transfer because it could be recovered from the initial transferee.

And, your Honor, if you look at the investment advisor cases that we point to in our brief, I think it is SEC v. Gruss and SEC v. ICP Asset Management, in those cases the Court looked to the Investment Advisor Act. And while the companies there pointed to the fact that they thought the focus was on the client and where the client might be located, the reality is the Court said when they looked at the Investment Advisor Act, it was, of course, what was Congress concerned with and focused on? The investment advisor.

So it comes down to this, your Honor. Under Morrison,

once you determine what Congress's focus is, whatever other facts that are outside that focus are not really relevant to the analysis here. So the fact of where particular recipients of the fraudulent transfers may reside are not within Congress's focus. The fact of where particular subsequent transfers may have taken place is not within Congress's focus. Those facts may be relevant to other defenses -- personal jurisdiction; it could have to do with whether or not the Trustee's judgment obtained here may be enforceable somewhere else -- but it does not go to the heart of the issue before the Court, and that is whether the presumption against the extraterritorial application of statutes applies here because this involves a purely domestic application of the statute.

And, your Honor, a word on Maxwell.

Maxwell was, of course, decided before the Morrison decision came out, but that case involved a foreign debtor. And so, your Honor, that would be arguably the quintessential example of what would be the extraterritorial application of the Bankruptcy Code and the avoidance and recovery provisions. Where it was a foreign company, an English company, that had liquidation proceedings going on in London. They had the very unusual circumstances of having dual primary liquidation proceedings going on in both the U.S. and in London. But Judge Brosnan focused on the fact that there, using a center-of-gravity test, the English company had made

preferential transfers overseas to English and French banks and basically in response to debts that were incurred by those banks overseas.

And, your Honor, pre-Morrison it was a center-of-gravity test. Post-Morrison that would probably be a situation where that English company cannot use the U.S. Bankruptcy Code and avoidance and recovery provisions to recover those transfers. That is not what we're talking about here.

And as a matter of fact, your Honor, counsel for the defendants brings up the liquidation in the BVI, and we're getting into a whole comity analysis, which, by the way, wasn't, you know, for the briefing before your Honor. We merely pointed out in our brief that the defendants' analysis of Morrison was flawed and it appeared to be more like a comity analysis.

I'm going to get into a very brief discussion -- I know you've read our papers; I'm not going to belabor the issue. But the very fact that the Fairfield liquidators are pursuing avoidance actions elsewhere in their insolvency proceedings -- and BVI is not surprising -- in a fraud as massive as this one, there are litigations involving multiple laws, multiple parties in various jurisdictions. Investors are suing feeder funds. Investors are suing the managers of those funds. Auditors are being sued all over the world. Insolvency

proceedings everywhere. But, your Honor, one of the things defendants didn't say is that the BVI didn't decide that the bankruptcy causes of action of those feeder funds were dismissed. Those causes of action of that feeder fund are actually pending right now. Those avoidance actions of the Fairfield liquidators, the Madoff feeder funds, are pending before Judge Lifland.

And you know what, your Honor, they're being brought in an ancillary proceeding here using the laws of the debtor's home country, the BVI. They're using their own country's laws, their Bankruptcy Code and avoidance and recovery provisions, because that's what the international community has decided to do.

Essentially, your Honor -- and I am drifting into comity, and, I'm sorry, I am just going to head in that general direction. But that's what Chapter 15 and the countries that adopted this model insolvency code say. Basically, those countries that have signed onto UNCITRAL have decided that they are going to aid the main proceeding of a bankrupt debtor and they are going to decide that that main proceeding is where the center of main interest of the debtor is -- generally, your Honor, where the debtor's principal place of business is. And so, your Honor, if you look at all the comity factors that are listed in the Restatement 403 that deal with the Restatement on Foreign Relations 403 and you look at them here, and it is very

clear that even under a comity analysis there is no other country that has more of an interest in ensuring that its bankruptcy code and avoidance provisions are applied to its debtor in the United States.

Certainly -- as a matter of fact, defendants don't even proffer another country's avoidance action or bankruptcy code that should apply to this debtor. And right there that's the rub, your Honor. The very case they cite to you, that feeder fund is using its own laws because that's the way it is supposed to work. There is no conflict.

But if you go through all of these factors -- the link of the activity to the territory of the regulating state, the extent to which the activity takes place within the territory or has substantial direct and foreseeable effect upon or in the territory -- obviously, your Honor -- and the connections such as the nationality, residence, or economic activity between the regulating state and the person principally responsible for the activity to be regulated -- without a doubt, your Honor, certainly the United States has a very significant interest in regulating the conduct of the debtor here, headquartered in the U.S., that orchestrated the most massive Ponzi scheme ever, out of New York, transferred all of its property out of a bank account in New York. So that factor clearly militates in favor here. Again, nothing pointed to by the other parties in that regard.

ARGUMENT

The character of the activity to be regulated, the importance of regulation to the regulate state. Obviously, the Bankruptcy Code and SIPA are two separate acts that are very concerned with this. Congress was very concerned and had a very serious interest in ensuring that and, including SIPA, the expedited return of customer property that is fraudulently conveyed by a financially-troubled in this case bankrupt broker-dealer.

I could go on, your Honor: The importance of the regulation to the international, political, legal, or economic system; the extent to which the regulation is consistent with the traditions of the international system; the extent to which another state may have any interest in regulating the activity.

The only law that the defendants point to is really a point that their own home residence might possibly be more interested in protecting the defendants in these particular actions.

And essentially, your Honor, with all due respect, comity is not the issue here, and it is certainly not the analysis under Morrison.

And, frankly, your Honor, even were this to be a situation where you concluded that this was a situation that requires extraterritorial application of the Code or SIPA, the decision in French that we point to in our brief, which essentially says, look, the Supreme Court has decided that to

determine what property or transfers that a trustee may attempt to recover and avoid, we have to look to essentially Section 541 of the Code, which has language, you know, essentially that defines what the property of the estate is, as wherever located; and that has been held to apply territorial without doubt, your Honor.

And as the French Fourth Circuit Court pointed out, because Congress intended to essentially determine what property could be transferred by referring to that statute, you have to look at what property was property of the debtor, wherever it was situated, as if before it was filed. An easier way for me to explain this, your Honor, is to give a hard example because I get caught up in the language when speaking.

Bernard Madoff had a yacht in France. And before the bankruptcy, just before we see the fraud -- and this is an example, it is not a fact -- he, before the fraud is revealed and before the bankruptcy proceeding is commenced, he fraudulently transfers that yacht in France to his nephew. Subsequently the bankruptcy proceeding is brought here in the United States.

Now, all the French court is saying is that but for that transfer that yacht would have been property of the debtor's estate here, and French is saying essentially that because Congress indicated its intent, you have to refer to Section 541 in order to determine what you can avoid, it would

make sense that the Trustee should be permitted to avoid that transfer in order to recall that to the estate that which should have been part of the estate but for that fraudulent transfer.

And so, your Honor, I guess what I would like to conclude with is a point that we weren't saying that defendants' arguments were absurd. We're saying that to stop the efficacy of the Bankruptcy Code at the borders would have absurd results. And we gave an instance of just before the bankruptcy what would have happened if Bernard Madoff had transferred billions of dollars of the customers' property to a cousin in Europe and then subsequently transfer it to another cousin in Switzerland. And, your Honor, that simply cannot be the result of that once the property leaves the jurisdictional territory of the United States, that somehow the doctrine of the presumption against extraterritoriality is going to stop that from happening.

And the other thing is, your Honor, as we pointed out in our papers, is the Code doesn't splice between who is a foreign resident and who is a domestic residence. And certainly claims of the customers, despite statements in the defendants' papers that somehow the Trustee has denied claims based on a party's foreign status, that is completely not the case. Two of biggest creditors in this case who got distributions this week are foreign creditors.

Your Honor, it has absolutely nothing to do with it. The fact that they were denied their customer claim had only to do with the fact that they didn't fit within the definition of "customer" under SIPA because they were an indirect investor.

So, your Honor, it would be absurd to use just the mere happenstance of a party's residence to define the analysis of extraterritoriality when those same parties could come in, and some of these same parties have, as we pointed out, filed claims in this very proceeding. So how does it work that we can't go out but they can come in?

So, your Honor, unless you have any further questions?

THE COURT: No. Thank you very much.

Let me hear from SIPC, if they want to be heard.

MR. LaROSA: We don't, actually, your Honor. We will stand on our papers, and I would be happy to answer any questions your Honor wants.

THE COURT: Very good. Let's go back to moving counsel.

MR. VELIE: Thank you, your Honor.

I still haven't heard any precedent, and the important point is not -- the starting point is not Morrison. Extraterritoriality and the presumption against extraterritoriality has been in our law since 1909, when Justice Holmes wrote the American Banana case. In the entire history of the Code, from 1978 forward, and the bankruptcy law

before that, there is no instance when a court has said to a trustee, it's OK, go recover a foreign transfer. Not one. Never. You would be the first..

That's the first point.

The second point is I thought I heard something about Section 550 saying that if you can avoid you can recover immediate and subsequent transfers and so on. We all know that that doesn't mean that you can't impose or look at defenses. The defense from 546(e), for example, the safe harbor for securities settlement payments, has to be interposed between that moment when there is an avoidance and a recovery. The defenses in 550 may be imposed. So the defense of extraterritoriality also needs to be looked at and imposed.

Because in the final analysis what we're being offered is a way to read the statute, and if the Trustee's counsel is correct and you read the statute this way, you will have all that impact on foreign sovereigns and foreign individual commercial transactions that I described earlier. When you have something like that, that was what the presumption against extraterritoriality was supposed to deal with, and that's why Morrison put in a bright-line test. And the bright-line test is very simple -- if it is not in the statute, that's it.

Finally, a word about the "absurd" result.

I think what the Trustee is trying to say here is that the Trustee will be without a remedy in the event you rule for

us, but that's not the case. Number one, there is a remedy which is provided in the Code in Section 1505, which we pointed out in our papers. He can go to foreign courts and go to the foreign court and ask for whatever relief the foreign court is willing to give him.

In fact, not only is that the case from the Code, showing that the drafters of the Code perceived that there might be this problem and solved it by legislating comity, just the way they legislate the permission for foreign liquidators to come here and open ancillary proceedings, they can open, as happened in Maxwell, a full-blown Chapter 11 or Chapter 7 case. Similarly, a Trustee here can go into foreign court and go there and ask for what the foreign law permits, and that would be the appropriate thing to do. It is not only the appropriate thing to do, the Trustee knows about it and is doing it and has brought proceedings in various countries around the world.

With your permission, I am going to read from the International Law Practicum, which is a publication of the International Section of the New York State Bar Association, and in it is an article in which Mr. Sheehan, who is Trustee's counsel, is one of the principal authors. And here he is speaking to a symposium, and he says -- he had been talking about foreign actions that he has brought and going into foreign courts and seeking relief in the foreign courts. "Almost every one of the foreign actions has a parallel

proceeding here in the U.S. Bankruptcy Court. The reason for that is fairly obvious. That is, what if we were just to rest on our laurels in the Bankruptcy Court and it turns out we lose the extraterritoriality issue, the personal jurisdiction issue, or whatever that issue may be? Are we therefore, what? Out of luck? We can't go anywhere? So what we're doing is parallel proceedings, and we participated, as I said earlier" -- this is Sheehan speaking -- "throughout the Caribbean Islands and in the U.K."

And that is what he was doing. He has a remedy. It is not absurd at all.

THE COURT: I don't actually see how the issue of whether he has or has not a remedy is relevant. Maybe I have missed something.

If he has a right to bring the lawsuit here, he has a right to bring the lawsuit here. If he doesn't, the fact that it would or would not deprive him of a remedy seems to me neither here nor there.

MR. VELIE: I am not arguing with you on that Judge.

Who I'm arguing with is Trustee's counsel who says that we are arguing for an absurd result, a result in which the Trustee would be without a remedy, and the answer is that that happens to be incorrect --

THE COURT: As I understood the Trustee -- and this is a gross oversimplification, but, I mean, let's take an example

that has nothing do with this case or even the laws here involved; it is just an abstraction.

So I steal your cow and I give it to my son. This is clearly a hypothetical since I only have daughters.

MR. VELIE: You don't have a cow either.

THE COURT: Not the last I checked.

And my son takes it to Europe and he sells it to someone there. And now you bring an action for the recovery of the cow or its value and you bring it to get the person who now has the cow. And that may not be an enforceable judgment, which is the point your adversary was making, but she's saying there is something absurd that you shouldn't be able to bring an action for recovery of the cow in the hands of -- we could make it even an easier case for her -- let's say that the person to whom the cow was sold in Europe knows that it is a stolen cow. So that's kind of absurdity I think she is trying to suggest.

MR. VELIE: Perhaps. But I think what we need to put into this discussion, Judge, is the distinction in the law between chattels and money. A stolen chattel does not deprive the owner of his title, and he can go anywhere and say I'm owner. That is not the case with money. There is the money rule, which allows the person who receives the transfer of money to put up all manner of defenses.

So I just want to try to help you in your thinking

about this. Don't be thinking about stolen chattels, stolen artwork or the like; it is a completely different ballgame. What we have here is a question of statutory interpretation purely, and that is that pursuant to the money rule can this Trustee ask this Court to undo a transfer that took place in the Cayman Islands, say, or in Europe between foreign persons and under foreign law?

And the following observations: No judge has ever done it before. The Bankruptcy Code seems to tell the Trustee if you want to go abroad, go to a foreign court and get your remedy there. Morrison tells us look to the statute and see if this is permitted, because it is plainly extraterritorial. And there is nothing in the statute that says that Congress intended this.

So in the final analysis, if you read it the way the Trustee reads it, we have this terrific, in the sense of full of terror, impact on foreign sovereigns, courts and persons -- never before permitted by a court from 1978 on or even before, as far as we could find. So you are being invited to do something new and, I submit, radical.

THE COURT: All right. Thank you very much.

All right --

MR. LACY: Your Honor, could I say a word?

THE COURT: Yes, but it had better be responsive to what the Trustee just said because you had your opportunity to

be heard in the beginning.

MR. LACY: Yes, your Honor.

I wanted to draw together three things that the Trustee's counsel said.

The first, of course, is that the Trustee's counsel treated this entire question in terms of whether United States Bankruptcy Code allows the avoidance of the initial transfer, and that is not the issue. The issue is whether Section 550(a)(2) of the Bankruptcy Code allows the recovery of money from a subsequent transferee. So the question you have to answer is does 550(a)(2) fly outside the United States.

Now, I want to emphasize the importance of that distinction by referring to another thing the Trustee's counsel said. The Trustee's counsel said there is no rule that says a foreign customer cannot submit a claim in a SIPC liquidation. That has nothing to do with this.

The rule, which the Trustee has enforced vigorously, is that the investor in a feeder fund which was a customer of BLMIS cannot submit a claim in a SIPC proceeding. And that's who the subsequent transferees are. The subsequent transferees who we are moving on behalf of cannot assert claims in the bankruptcy case because they were not customers of BLMIS, and the Trustee, with now the support of this Court and the Second Circuit, established that those subsequent transferees, because they are not customers, cannot assert a claim in a SIPA

proceeding and will never share in any of the recoveries that the Trustee accomplishes by avoiding transfers.

The third point is that we heard an astonishing discussion concerning the importance and value of the Fairfield Funds' assertion of claims under the BVI Insolvency Act. I wanted to go back to that.

Section 550(a)(1) gives the Trustee the right to recover by avoided transfer from the initial transferee; that would be the feeder fund in these cases. Section 550 says you can't get a double recovery; if you get it from the initial transferee, you can't get it from anybody else.

Now, suppose that a judgment is obtained against the feeder fund, against the initial transferee. Why shouldn't the satisfaction of that judgment end the case against the subsequent transferee? The reason it won't end the case against the subsequent transferee, if the Trustee is allowed to assert these claims, is because, of course, the initial transferee turns out to be insolvent. There isn't enough money there.

But what happens then? That insolvent initial transferee, in the cases we are talking about, is a foreign entity. It's winding up. Its insolvency proceeding should proceed under the law where it's organized, and I take it that the Trustee's counsel endorses that.

Well, if the Trustee gets a judgment against a feeder

fund, an initial transferee, based on the avoidance of the transfer, he becomes a creditor in the foreign solvency proceeding. He will share in any recoveries that the Fairfield liquidator obtains as a result of these things you have heard about under the BVI Insolvency Act. Why isn't that enough?

The Trustee is here saying but we're not satisfied with that, because whereas all the other creditors in the BVI insolvency proceeding have to share and share alike, we can go straight to somebody who received a transfer from that foreign entity and we can recover the whole thing ourselves. We can go around the liquidator. We don't have to rely on the liquidator's insolvency proceeding and the liquidator's recovery actions, and we don't have to share with the other creditors. We are going to go straight around the liquidation straight to the remote transferee and recover. That seems to me to put the comity issue in very sharp relief, but I think it also affects the extraterritoriality question, the Morrison question, because in Morrison and in EEOC v. Arabian American Oil, the Supreme Court has made clear that one of the things you think about when you answer the question concerning extraterritoriality is whether you are going to be doing something seriously disruptive to affairs that are supposed to be governed by foreign law. And it seems to me that the Trustee's argument today has demonstrated that the claims they are trying to assert here would have exactly that effect.

Thank you, your Honor.

THE COURT: Thank very much.

Anyone else on the moving counsel's side who wants to be heard

MR. BERMAN: No, your Honor.

THE COURT: All right. I will give the Trustee an opportunity to have the final word, if you would like.

MS. GRIFFIN: Thank you, your Honor. It will be very brief.

Your Honor, I guess all I would ask you to do when you hear these analyses that drill down to these very esoteric issues is to back up and look at the two issues that are before your Honor, and they are is this a domestic application of the Bankruptcy Code to a U.S. debtor to replenish the estate of property that rightfully belongs here, and is the Trustee using the Code as it was intended by Congress?

Two, your Honor, just to point out a little factual inaccuracy. In those actions that the Trustee is pursuing abroad, he is bringing claims brought under the U.S. Bankruptcy Code. He is pursuing them in the event -- in the alternative under foreign law in the event that the defendants either default here and -- you know, it is to preserve his rights in case a party tests jurisdiction or the enforceability of a default judgment. And, your Honor, frankly, that is what the defendants are really trying to do here. They are really

trying to cloak what are jurisdictional issues or enforceability issues in the guise of a statutory construction issue, and that is not what Congress intended.

Thank you, your Honor.

THE COURT: All right. Well, I want to thank all counsel for excellent argument.

The Court will take the matter sub judice. Thanks very much.

(Pause)

THE COURT: So I spoke too soon. There is one other lawyer who wants to be heard.

MR. SCHIMMEL: Thank you. Your Honor, I represent CACEIS Bank and CACEIS Bank Luxembourg, which are --

THE COURT: You need to identify yourself.

MR. SCHIMMEL: Daniel Schimmel, of Kelley Drye & Warren, for defendants CACEIS Bank and CACEIS Bank Luxembourg.

I wanted to add one point that goes to the cow example that your Honor raised and one of the cases that's cited in the brief, which is the Midland case. I think that case is actually on point and responds to your question, because it involved a massive Ponzi scheme organized in the United States. The perpetrators of that Ponzi scheme were convicted in the Central District of California. The debtor in that case comprised both entities in the U.S., including California corporations and foreign entities. The transferor was a

Barbados corporation. And the Court in that case looked at the extraterritorial application of the avoidance provisions of the Bankruptcy Code and said they do not apply extraterritorially to these transfers, that the presumption against extraterritoriality applied even though it was a crime in the United States, a Ponzi scheme in the United States, and the debtor comprised some U.S. entities, and the Court looked at where the transfer took place. That was the key factor.

THE COURT: All right. Thank you very much.

Does the Trustee want to add anything on that?

MS. GRIFFIN: Your Honor, that was pre-Morrison and so that would be my only -- was it post?

(Counsel conferred)

MR. SCHIMMEL: It is pre.

MS. GRIFFIN: And, your Honor, if the Court were to apply the Morrison analysis, I think the result would be as the Trustee submits.

THE COURT: All right. Thank you all very much.

This is an easy case. I'm being asked to make an everyday application that has never been done before, if I understand the competing arguments of counsel.

So I will take it sub judice.

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